IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~010~~ 70-32

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, and NATIONAL LABOR RELATIONS BOARD, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT PITTSBURGH PLATE GLASS COMPANY IN OPPOSITION

GUY FARMER
Counsel for Respondent Pittsburgh Plate Glass Company
1120 Connecticut Ave., N. W.
Washington, D. C. 20036

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QUESTION PRESENTED

Whether under the circumstances the employer was required by Section 8(a)(5) of the Act to renegotiate with the union representing active employees the retirement benefits of persons already on retirement, or whether the employer could lawfully offer retirees an

individual option of continuing their established retirement benefits or electing, instead, to receive a cash contribution to Medicare.

STATEMENT OF THE CASE

A. The Facts

This case arose as a result of events occurring at the Barberton, Ohio, plant of respondent in March 1966. Previously, in 1964, respondent had increased its contribution to medical insurance for persons already on retirement from $2.00 to $4.00 per month, with the understanding that this extra $2.00 would be withdrawn if Medicare was enacted.

Medicare was enacted in 1965, and became effective July 1, 1966. Consequently, in March 1966, the company reduced its contribution to the medical insurance from $4.00 to $2.00 per month as had been stipulated. The company first proposed to cancel the insurance plan because it contained non-duplicating clauses which nullified its value for those retirees who enrolled in Medicare. But, when the union objected and sought to reopen the retirement benefits generally, the company decided to continue the insurance plan for those who wanted it. However, the company wrote to the retirees affected and offered them the individual option of continuing the medical insurance or withdrawing from the insurance plan and receiving, instead, a $3.00 per month contribution to cover the full cost of Medicare (App. A, pp. 2-5).[1]

The charges of unfair labor practice giving rise to this case were then filed with the NLRB.

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[1] All references in this brief in opposition are to the Appendix to the Petition for Certiorari.

B. The Trial Examiner's Decision

The Trial Examiner dismissed the charges. He found that in offering the option to the employees the company violated no provision of the Act. (App. E, pp. 56-73.)

C. The Board Decision

The NLRB reversed the Examiner. The Board majority held that the company had unilaterally changed the medical benefits of retired persons in violation of the Act when the company offered the option to the retirees (App. D, pp. 23-49).

One member of the Board dissented. He held that persons on permanent retirement are not "employees" and not a part of the "bargaining unit" which the union represents. He called on a long line of Board precedent excluding retirees from bargaining units and denying them a vote in the election of a bargaining agent. He found that, while some employers and unions had voluntarily negotiated increases in retiree benefits after their retirement, such voluntary practices did not create a *mandatory* obligation under the Act to renegotiate the benefits with which employees retire (App. D, pp. 49-54).

D. Decision of the Court Below

The court below set aside the Board's order.

The court held that the issue in the case was not whether benefits for active employees to take effect upon retirement are mandatory issues for bargaining. This issue is settled and is not before the court (App. A, pp. 8-9).

The court also pointed out that this is not a case of an employer abrogating retirement benefits, in which event the retiree would have an appropriate remedy for breach of contract under Section 301 of the Labor-Management Relations Act.

The court stated the issue:

> "The issue is, once retirement benefits have been negotiated for active employees [to take effect upon retirement] whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are 'employees' under Section 8(a)(5), changes in whose benefits must be collectively bargained with the Union." (App. A, pp. 9-10).

On this issue, the court held that, while for some purposes, the Act extends protection to persons not currently serving employers, "by plain meaning an employer has no statutory duty to bargain collectively with persons who are not 'his employees'." (App. A, pp. 10-11).

The court derived this holding directly from the Statute. Section 8(a)(5), the court stated, plainly provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative of *his employees,* subject to the provisions of Section 9(a)." (App. F, p. 74).

The court then examined the evidence and found that, on the facts of this case, retirement with this company is a complete and final severance of employment. Therefore, the court held, retirees are not "employees" of the "employer" for purposes of Section 8(a)(5).

The court further held that retirees were not included in the bargaining unit certified by the Board as appropriate under Section 9(a), a prerequisite to mandatory bargaining under Section 8(a)(5).

Section 9(a) states:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for purposes of collective bargaining . . ." (App. F, p. 77).

The court noted that it has uniformly been held by the Board and the courts that the scope of the bargaining unit controls the extent of the bargaining obligation, and that a union cannot demand, over the employer's objection, a change in the unit as determined by the Board. In this case, the Board had certified a unit for bargaining which included only active employees working on hourly rates, and retirees were accordingly excluded from voting. This was done, as the court pointed out, in harmony with consistent Board rulings excluding retirees from bargaining units and from voting in representation elections. The court found, therefore, that the retirees of this company were not within the bargaining unit; and, therefore, under the plain meaning of the Act, the employer was under no mandatory duty to renegotiate the benefits with which they had retired (App. A, pp. 15-18).

Enforcement of the Board's decision was, therefore, denied. A motion for reconsideration, *en banc,* was also denied (App. C, p. 22).

ARGUMENT

A clear focus on what is and what is not involved in this case is essential.

There is no issue whether pension and insurance benefits are mandatory subjects of bargaining under the Act. *This issue* was settled long ago in *Inland Steel Company*, 170 F.2d 247 (C.A. 7, 1948), cert. den. 336 U.S. 960, and, as petitioner acknowledges, the court below accepted this principle without question. There is no issue as to the legal enforcement of retiree benefits. Nor is there an issue whether unions and employers may voluntarily negotiate benefits for persons already retired.

The sole issue is whether, once retirement benefits have been established and an employee retires and begins collecting his benefits, the union representing active bargaining unit employees can demand that the employer renegotiate these benefits, up or down, without limitation. The answer to this question turns on the Statute, and the court below correctly held that mandatory bargaining does not extend to renegotiating retirement benefits for persons already retired.

On the facts, the decision of the courts was manifestly correct. There is no conflict of decision, and, in the light of the language and purpose of the Act, no other result could have been reached. There is no important question of Federal law requiring decision by this Court.

Moreover, on the facts presented, the issue is a narrow one, not presenting an appropriate case for review or justifying the Board majority's far-ranging pronouncements. As cogently stated by the dissenting Board member:

> "Stripped to its essentials, this is a case where a union charges an employer unilaterally offered

an additional option on its health plan for past pensioners. The Company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests, assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision of far-reaching implications in the area of mandatory duty to bargain." (App. D, pp. 49-50).

The dissenting member held the view that the majority, in unnecessarily extrapolating the issue in this fashion, exceeded the Board's authority under the Act (App. D, p. 54).

The Board majority's broad dictum was grossly in error and had great potential for mischief in its impact on developing labor-management relationships along voluntary lines. But this manifest error has now been corrected by the decision of the court below. The issue, as presented, is not a close one. It has been correctly decided by the court below, and is simply not worthy of consideration by this Court on review.

A. The Decision Below Is Clearly Correct

The decision of the court below turned on the court's finding, after a careful review of the facts and governing law, that persons on retirement are not "employees" and not a part of the bargaining unit as provided in Section 8(a)(5) of the Act. The decision was clearly correct.

Section 8(a)(5) specifically provides that mandatory bargaining is limited to "employees" of the particular employer, and, by reference to Section 9(a), further restricts bargaining to the "unit" established as appropriate for such purposes.

The court's finding that the retirees are not employees of this employer is based on the record evidence. This evidence showed that with this company, retirement is a complete and final severance of employment. Upon retirement, employees are removed from payroll and seniority lists, and thereafter they perform no services for the employer, receive no wages, are under no restriction as to other employment, and have no expectation of reemployment. They lose their active status as union members, forfeit their voting rights in the union, and are relegated by the union's constitution to the status of non-voting "honorary" members. Based on these facts, the court held that retirees are not "employees" of the employer nor members of the bargaining unit. (App. A, pp. 14-18).

This finding is not seriously contested by petitioner. The main thrust of petitioner's argument is that, whether employees or not, or in the bargaining unit or not, renegotiation of retiree benefits is mandated by the Act because "active employees are vitally concerned with the level of benefits established for the retirees and that these benefits will be received."

As the court below rightly concluded, the acceptance of this argument would literally amount to an amendment to the Act. It would substitute for the statutory standard of unit bargaining a concept of "interest" bargaining with no recognizable metes or bounds. Under this concept, a union, once established as representative of any employee unit, could then unilaterally enlarge the unit to encompass bargaining for other classes of employees or persons clearly excluded from the unit it represents, as long as it might appear that the wages and benefits of the excluded groups could obliquely "affect" unit employees.

Petitioner's theory that bargaining for retirees is necessary to protect the bargaining interests of "active" employees in their own retirement benefits is conceptually false. The right of the representative of "active employees" to bargain for the benefits they are to receive on retirement is fully protected by the Act and is fully capable of exercise without involving retirees. There is nothing to suggest that active employees are handicapped or hampered in any degree *in negotiating their own retirement benefits by their inability to demand renegotiation of the benefits of those who have already retired.*

The second part of petitioner's argument is that mandatory renegotiation of retiree benefits is necessary to provide assurance that established retiree benefits will be paid. This argument is obviously without force. There is no correlation between protection of benefits already established and renegotiation of benefits. As the court below held, a complete answer to this argument is that the Federal law provides an effective means by which retirement benefits can be legally enforced (App. A, p. 17).

The conclusive answer to all of petitioner's arguments is found in the fact that Section 8(a)(5) defines and restricts the bargaining obligation: (1) to employees of the particular employer and (2) to members of the bargaining unit as defined in Section 9(a). The retirees here do not meet either test. But, if more were needed, it is revealing to contemplate the conflict with democratic principles involved in vesting exclusive bargaining authority over retiree benefits in a union designated by active employees to represent the interests of active employees. In this case, retirees have no vote or voice in the union, and no control over

union policies or negotiating positions; and, under unbroken Board precedent, they have no voice in selecting or changing or unseating the union which claims the exclusive right to negotiate changes in the benefits with which they have retired (App. D, p. 50). Petitioner's claim of mandatory bargaining authority cannot be squared with democratic precepts in general any more than it can be accommodated to the specific provision of the Act.

The decision of the court below finds solid support in the following:

1. The language of Section 8(a)(5) which restricts the employer's bargaining obligation to "his employees" and further makes the obligation subject to Section 9(a).

2. (a) the decision of this Court in *Phelps Dodge Corp.*, 313 U.S. 177 (1941):

> "In determining whether an employer has refused to bargain collectively with representatives of 'his employees' in violation of Section 8(5) and Section 9(a) it is of course essential to determine who are 'his employees'." 313 U.S. at 192.

(b) The decision of the NLRB in *Page Aircraft,* 123 NLRB 159, 43 LRRM 1383 (1959):

> "The antidiscrimination provision refers to employees *generally,* whereas, unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for '*his employees*'." (Emphasis in original.)

(c) The decision of the Board and Third Circuit in *Piasecki Aircraft,* 123 NLRB 348, 43 LRRM 1443 (1959), enf'd 280 F.2d 575 (C.A. 3, 1960); cert. den. 364 U.S. 933:

> "It [the Board] recognized the distinction in Section 8(a)(5) wherein an employer is required

> to bargain in good faith with the representative of 'his employees' and held the Bellanca workers were not 'his' [Piasecki's] employees within the meaning of that Section. 280 F.2d at 589.

(d) The decision of the NLRB in *Briggs Manufacturing,* 75 NLRB 569, 21 LRRM 1056 (1959):

> "The Act thus provides for the use of the term 'employee' in the broad generic sense as defined in Section 2(3) of the Act, and also in a more limited sense whenever the Act explicitly so provides. In its generic sense the term is broad enough to include members of the working class generally (See *Phelps Dodge Corp* v. *NLRB,* 313 U.S. 177). In its limited sense, the term may include only the employees of a particular employer, as for example in Section 8(5), which requires the employer to bargain collectively with representatives of *'his employees,'* subject to the provisions of Section 9(a)." (Emphasis in original.)

3. The language of Section 9(a) which restricts bargaining to the "unit appropriate for such purposes."

4. The uniform precedents of the NLRB excluding retired persons from bargaining units and from voting in representative elections.

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered employees, we believe they lack a substantial community of interest with the employees who are presently in the active service of the Employers." *Public Service Corp.,* 72 NLRB at 229-30; see also, *W. D. Byron & Sons,* 55 NLRB 172, 14 LRRM 25 (1944); *J. S. Young Company,* 55 NLRB 1174 (1944).

5. The decision of this Court in *U.M.W.* v. *Pennington,* 381 U.S. 657, at 666 (1965), where the Court cautioned that bargaining must be conducted on a "unit by unit" basis, and, in an antitrust context, condemned "interest" bargaining.

Explicit to the point are those Board and court decisions which hold that the scope of the bargaining unit limits and controls the bargaining process. *I.L.A.* v. *NLRB,* 277 F.2d 681 (D.C. Cir. 1960); *Douds* v. *I.L.A.,* 241 F.2d 278 (C.A. 2, 1957).

The Board majority turned its back on and ignored its own and court precedents which have shaped the development of the law of mandatory bargaining since the inception of the Act. The court below has clearly perceived and corrected this error. The decision of the court below is plainly correct.

B. There Is No Conflict of Decision

Petitioner argues that the decision of the Court below conflicts with the opinion of the Court in *Teamsters Union* v. *Oliver,* 358 U.S. 283 (1958), and *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964), and with decisions of the Eighth and Ninth Circuits in *Blassie* v. *Kroger Co.,* 345 F.2d 58 (C.A. 8, 1965), *Local No. 688, International Bro. of Teamsters* v. *Townsend,* 345 F.2d 77 (C.A. 8, 1965); and *Garvison* v. *Jensen,* 355 F.2d 487 (C.A. 9, 1966).

There is no conflict with these decisions. The issue in *Oliver* and *Fibreboard* related to the contracting out of unit work. In *Oliver,* an antitrust case, the employer was contracting out unit work of the drivers to owner-operators who were in direct competition for the work of the unit drivers. In *Fibreboard,* the employer con-

tracted out to an independent contractor all of the jobs in the bargaining unit. The decisions hold that the union representing unit employees can require bargaining for reasonable restrictions to protect their unit work from erosion through subcontracting. There is no holding that the union's bargaining rights extend to actual and exclusive representation of persons outside the bargaining unit.

The important distinction is that, unlike the subcontractor employees in *Fibreboard* and the owner-operators in *Oliver,* persons on retirement do not compete in any way for unit work and in no way threaten the job security of the active unit employees or hamper their ability to negotiate their own wages, conditions, or retirement benefits. As the Court below said:

> "Leaving aside their altruistic sentiments, what active employees are interested in are *their own* retirement benefits. It is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement." (App. A, pp. 17-18).

Petitioner's argument amounts to an attempted projection of mandatory bargaining authority beyond the bargaining unit to encompass classes of persons who are not employees and not a part of the unit for bargaining as defined pursuant to Section 9(a). The consequences of such a significant departure from the statutory concept of "unit bargaining" are vast and unplumbed and potentially disturbing to labor-management relations. The argument ignores the language and intent of the Act. As the Court below held:

> "Congress decreed that the bargaining agent's authority extend only to bargaining for 'all the em-

> ployees in a unit appropriate for such purposes'. The appropriate bargaining unit has economic incidents which the Board simply cannot modify by fiat or enlarge by sympathy." (App. A, p. 18).

The claimed conflict with *Blassie, Townsend* and *Garvison* does not exist.

These Circuit Court decisions involve an interpretation of Section 302, a criminal provision pointed narrowly at making it unlawful for an employer to make payoffs to unions and their representatives. Section 302(c) exempts from this criminal prohibition employer contributions to trust funds to pay pension and retirement benefits. These decisions hold only that the exemption allows payments to a trust fund for the benefit of retirees. They do not touch on mandatory bargaining or its proper scope.

The Court below considered *Blassie* and *Townsend* and correctly held that they were not apposite to the issue at hand.

C. There Is No Important Issue of Federal Law

Petitioner overstates the importance of the issue.

The issue is in a narrow sense one of first impression, but the principles which control its resolution have long been a part of the fabric of the law of collective bargaining.

Moreover, the very fact that this is the first case in the 35-year history of the Board in which the Board has felt impelled to consider this precise issue strongly suggests that the issue does not loom large in the spectrum of issues arising under the Act. When one takes into account the volume and intensity of litigation before the Board and in the courts over other issues

arising under the Act, the conviction emerges that the importance of this issue is more imagined than real.

There is nothing to suggest that the issue of mandatory renegotiation of retiree benefits has been a source of labor-management friction or labor unrest. Indeed, all signs point to the contrary.

Petitioner's expressed concern about the effect of the decision below on voluntary bargaining practices of management and labor is groundless.

The Court below did not declare renegotiation of benefits illegal or out of bounds. The court held only that such renegotiation was not mandated by the Act. The court noted with approval the development of voluntary practices between employers and unions reflecting their mutual concern with improving retiree benefits. The court below said:

> "This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship and is to be encouraged." (App. A, p. 20).

The court, in obedience to the Statute, wisely refused to channel these voluntary efforts into a mandatory mold.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

GUY FARMER
Counsel for Respondent
1120 Connecticut Ave., N. W.
Washington, D. C. 20036

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